

100. KFUE's attempt to reinvent its own Opposition was repeated in KFUE's Response to FCC Inquiry, December 28, 1992. There, KFUE suggested that the Opposition had really only meant that

the number of persons (both minority and non-minority) who possess the specialized skills required of certain employees at the stations is by definition far less than the number of persons in the labor force as a whole, and that it would therefore be inappropriate to compare KFUE's employee profile with the general labor force of the St. Louis SMSA. KFUE had suggested that, instead, the Commission compare KFUE's employee profile in certain job positions with statistics showing the availability of persons in the St. Louis labor force with the specific background required for these positions.

MMB Ex. 14, p. 31-32. However, Opposition didn't refer to "both minority and nonminority" persons supposedly being deficient in these "specialized skills" -- only minorities. Indeed, if "both minority and nonminority" persons were equally deficient in these skills, it would hardly have been necessary for the Opposition to have resorted to an argument whose predicate was that minorities are more deficient in these "specialized skills" than Whites.

101. In her direct case testimony, Cranberg attempted to put distance between herself and KFUE's Opposition. She stated:

[W]e presented the statistics regarding the station's minority listeners solely in a preliminary effort to argue that statistics should take into account the relevant pool of qualified individuals for particular specialized employment positions in order to have any meaning. In my view, this is a method of analysis the FCC specifically endorsed in Equal Employment Opportunity Guidelines, 47 R.R. 2d 1689 (1980). It is also a method of analysis which Arnold & Porter had previously employed before the Commission on behalf of other broadcast clients.

We acknowledged in the Opposition that we were not aware of any statistics regarding the percentage of minorities with classical music training. Therefore, we cited to the statistic regarding minority listeners by rough analogy. Our intent was only to make the limited legal argument that comparing overall population statistics to individual employment statistics provides relatively a crude statistical comparison.

KFUO Ex. 8, pp. 6-7.<sup>8/</sup>

102. However, Cranberg did not provide any previous examples of Arnold & Porter's use of a station's racial audience demographics as an estimate of the population qualified to work at the station.<sup>9/</sup>

103. Nor did she explain why the Opposition needed to refer only to African American listeners if KFUE's purpose was to show that it was hard to attract any applicants. She could not offer that explanation because KFUE had already gone on record as saying that attracting qualified job applicants generally was effortless. The Opposition represented, at some length, that the "specialized nature" of KFUE's formats yielded "a large number of qualified 'write-in' applicants each year, resulting in KFUE's possession of 'typically...20 resumes on file for persons with the specific qualifications KFUE seeks.'" KFUE Ex. 4, Tab 7, pp. 16-17. Similar representations had also been made in KFUE's May 12, 1992 Letter and its September 21, 1992 Motion to Strike. MMB Ex. 6, p. 3; MMB Ex. 11, p. 13.

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<sup>8/</sup> Cranberg stated that she used the terms "knowledge of classical music," "classical music training," "expertise in classical music," and a "working knowledge of classical music," to convey the same idea, which was that "persons hired for the relevant positions had to have a fairly significant knowledge of classical music." KFUE Ex. 8, p. 6, n. 2.

<sup>9/</sup> Since 1983, the undersigned counsel has handled over 90% of EEO litigation at the FCC. He has never heard of Arnold & Porter or any other law firm making such an argument -- except in this case.

104. Furthermore, the decision Cranberg cited, Equal Employment Opportunity Guidelines (Reconsideration), 47 R.R. 2d 1689 (1980) ("EEO Guidelines") cannot be read by any experienced FCC practitioner as having contemplated a claim of a listenership - job qualifications nexus, especially to justify a record consisting of virtually zero protected group hires.<sup>10/</sup> After rejecting the NAB's argument for "skills availability" test (an argument which never suggested that skills availability should be determined by a station's audience composition), the Commission conceded only that

there are certain highly specialized areas of broadcast industry employment in which few women and minorities have as yet acquired the requisite professional skills. This is the case particularly as to college graduate electronic engineers. The Commission will, in its in-depth reviews, take cognizance of a licensee's inability to employ women or minorities in positions for which the licensee documents that only a very limited number of women or minority group members have the requisite skills. The licensee should show in its EEO program that the skills are in fact required, and provide Census or similar data indicating that, as to women or minorities, individuals possessing these skills are as yet in short supply. Evidence of efforts at recruitment should also be presented. The Commission expects that the cases in which such a showing can properly be made will be few (emphasis supplied).

105. Thus, EEO Guidelines stands for the opposite proposition for which Cranberg cited it in her testimony.

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<sup>10/</sup> The D.C. Circuit has observed that "[o]f course, 'statistical evidence of an extremely low rate of minority employment could constitute a prima facie showing of discrimination.'" Bilingual I, supra, at 658 [Bilingual Bicultural Coalition on the mass Media, Inc. v. FCC, 492 F.2d 656, 658 (D.C. Cir. 1974 ("Bilingual I")], citing Stone v. FCC, 466 F.2d 331 at 329-330 (D.C. Cir. 1972)." EEO Guidelines, supra, at 1692 n. 12.

106. The argument was not Cranberg's argument, it was KFUD's argument. Stortz supported the Opposition with a notarized affidavit. KFUD Ex. 4, Tab 7, p. 53. He wrote Cranberg saying he didn't want the argument used as an "excuse." Stortz Memorandum to Cranberg, September 17, 1992, KFUD Ex. 4, Tab 8; see KFUD Ex. 4, p. 11, n. 2. However, that memorandum did not direct Cranberg to withdraw or modify KFUD's theory, and she did not do so.

**F. EEO Practices Of The Stations**

107. KFUD instituted a number of deliberate steps, unprecedented among broadcast licensees, to minimize the possibility that a qualified African American would ever walk in the door seeking a currently open position.

108. These policies were surgically successful. KFUD could not point to even one African American applied for a nonsecretarial job during the entire seven year license term.<sup>11/</sup> This is unprecedented.<sup>12/</sup>

109. Here is how African Americans were kept unaware of job openings.

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<sup>11/</sup> Given the scarcity of African American employees and applicants, an African American applicant could hardly have been forgotten by all of KFUD's witnesses and nonwitness employees.

<sup>12/</sup> In no reported or nonreported EEO case of which undersigned counsel is aware has this ever happened at a major market station. The only case coming close is Florida NAACP v. FCC, 24 F.3d 271 (D.C. Cir. 1994) ("Florida NAACP"), where the lack of African American applicants was held explainable because the stations paid too little to justify a 23 mile commute from Tampa.

1. Job Postings

110. Stortz maintained that the Stations posted notices on its bulletin boards to the effect that KFUD was an Equal Opportunity Employer. KFUD Ex. 8, p. 7. However, he also testified that KFUD posted its Position Guides and Duty Descriptions there when jobs were open. Tr. 509, 653-54, 731, 733-34. As shown at Table 4 supra, those documents frequently contained references to "essential" or "desirable" religion-based qualifications or supposed qualifications.

111. KFUD claims that it posted job openings at the Synod's International Center beginning in 1986 or 1987.<sup>13/</sup> KFUD claims that the Center's "employees" are about 11.5% minority." KFUD Ex. 4, p. 12. However, although KFUD had access to employment data for its own parent institution,<sup>14/</sup> KFUD did not provide the number of minorities or African Americans working at the Center, enabling the Court to determine whether the Center had three African American employees or thirty.

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<sup>13/</sup> KFUD did not explain why no job openings were posted at the Center until 1986 or 1987.

<sup>14/</sup> The International Center is the Church headquarters. MMB Ex. 11, p. 12.

112. Nor did KFUD provide the Center's percentage of African Americans, or the jobs at which minorities worked. KFUD did not state that any African American employee at the Center (except, presumably, Clancy) is employed other than as a secretary, receptionist or janitor. Indeed, KFUD's own employees are apparently counted in the International Center's employee list,<sup>15/</sup> and as we have seen, after Lula Daniels passed away, all African Americans employed at KFUD were secretaries or receptionists. See ¶¶35-36 supra.

**2. Procedures Which Kept African Americans Unaware Of Employment Opportunities**

**a. Procedures Before The Petition To Deny Was Filed**

113. KFUD's list of job hires and the recruitment sources used for those hires shows that there were 43 fulltime and 41 parttime hires during the license term. KFUD Ex. 4, Tab 6. That exhibit identifies the sources that were used in recruiting for the position for which the named individual was eventually hired. Tr. 757-58 (Testimony of Dennis Stortz).

114. Thirty-eight fulltime and 37 parttime vacancies were filled before September 29, 1989, when the renewal applications were filed. Of these 75 vacancies, 69 were filled through resumes on file, internal Synod sources (not specifically African American Lutheran Churches or sources), or word of mouth. KFUD Ex. 4, Tab 6.

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<sup>15/</sup> KFUD employees are employees of the International Center. MMB Ex. 14, pp. 23-24 n. 6.

115. KFUD says it used Broadcasting magazine for four openings, but there is no indication that any minorities applied as a result of these ads. Id.; but see MMB Ex. 6, p. 4 (KFUD response to a Bilingual letter, representing that Broadcasting was actually only used for three vacancies.)

116. KFUD used the St. Louis Post-Dispatch for one opening; there is no indication that any minorities applied as a result of this ad. KFUD used the St. Louis Broadcast Center for four openings; and again, there is no indication that any minorities applied as a result of these referrals. KFUD Ex. 4, Tab 6.

117. One opening, that of a Secretary, was filled by Cynthia Blades on November 1, 1989, just over a month after the 1989 renewal applications were filed. The Lutheran Employment Project was the only source used for this vacancy. All three candidates for this position were minorities. Id., pp. 7-8.

118. The only extrinsic proof offered by KFUD to support its claim that it advertised for minority employees was contained in KFUD Ex. 4, Tab 9; see KFUD Ex. 4, p. 12.

119. That exhibit contained three ads in Broadcasting. Broadcasting, September 29, 1986, p. 91, KFUD Ex. 4, Tab 9, p. 1 (September 29, 1986 ad for AM/FM General Manager); KFUD Ex. 4, Tab 9, p. 3 (another Broadcasting ad for General Manager; KFUD Ex. 4, Tab 9, p. 8 (another Broadcasting ad, for AM announcer). However, all three Broadcasting ads which did run omitted any mention that KFUD was an equal opportunity employer.<sup>16/</sup>

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<sup>16/</sup> The exhibit also contained a letter from Stortz to Broadcasting with copy for an ad for a salesperson. KFUD Ex. 4, Tab 9, p. 2. There is no evidence that the copy ever ran.

120. Stortz attributed the absence of EEO notices in the Broadcasting ads to an "inadvertent error." KFUO Ex. 4, p. 12 n. 3. His direct testimony did not explain who made these "errors", how a genuine equal opportunity employer could have made three such "errors", whether the person making the "errors" were ever reprimanded or otherwise sanctioned, or what steps were taken to insure that no such "errors" would recur. On crossexamination, Stortz admitted that he had placed at least one of the ads himself. Tr. 777.

121. The only sources identified in KFUO's direct case for recruiting of potential KFUO(AM) employees were Concordia Seminary and The Lutheran Witness, "which was widely distributed to members of Lutheran Church-Missouri Synod congregations, including of course the Church's African American members." KFUO Ex. 4, p. 12. KFUO's direct case did not show how many position notices were published in The Lutheran Witness, and KFUO chose not to put copies of the publication in the record. However, in response to the Bilingual inquiry, KFUO had admitted that it used The Lutheran Witness only four times -- three times for general manager openings, and once for the AM Program Director opening. MMB Ex. 6, p. 4. KFUO's direct case conspicuously omitted the fact that the publication distributed to local members of Lutheran congregations -- the St. Louis Lutheran -- was used only twice, for the secretary/receptionist and maintenance worker positions filled on the last two days of the license term. MMB Ex. 6, p. 4.<sup>17/</sup>

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<sup>17/</sup> Stortz testified that he recalled the placement of ads in another publication, The Lutheran Reporter, which he said was directed to "professional church workers." Tr. 752. However, the record contains no evidence of any such placements, or any other information about The Lutheran Reporter.



122. There is no evidence that KFUD(AM) ever used secular sources, or even minority religious sources, even for secretarial or janitorial openings.

123. KFUD had to confront this EEO history shortly before license renewal time. The person who figures most in this process is Thomas Lauher. Lauher was the General Manager of KFUD-FM from May, 1987 until July, 1989. KFUD Ex. 6, p. 1 ¶1; KFUD Ex. 4, Tab 6, p. 3. Devantier hired him. Id. He was a witness for KFUD in this proceeding.<sup>18/</sup>

124. Lauher's written statement says that he "did not have final hiring authority over sales workers for the FM station." His statement does not say who had that authority, or whether his recommendations for hires were routinely accepted. KFUD Ex. 6, p. 1 ¶3.

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<sup>18/</sup> Lauher's testimony is quite tainted. He signed his written declaration on May 21, 1994. KFUD Ex. 6, p. 3. His testimony was written in the presence of and with the assistance of KFUD counsel; indeed, counsel contacted him seeking his testimony. Tr. 110. Two days later, he provided an interview to the NAACP's representative, Michael Blanton, ostensibly so Lauher could be an NAACP witness. Tr. 73-74, 108. Lauher taped that interview (with Blanton's consent, but without notice to Blanton of its intended use by Lauher. Lauher then transcribed the tape and delivered the transcript to KFUD counsel. Tr. 127-28, 132. When asked whether he had informed Blanton that he had committed himself to KFUD as its witness before being interviewed by Blanton, Lauher twice responded "Mr. Blanton did not ask." Tr. 127. Lauher would not have given this answer if he had any respect at all for the NAACP. Consequently, his testimony should be viewed as nonobjective, having been poisoned by bias against the NAACP. (He certainly didn't know anything about the NAACP, having testified that he did not send the NAACP job notices because he was "unaware" that it is an "employment service." Tr. 190. For over 80 years, the NAACP has provided job referrals, a fact so well known that the FCC mentions the NAACP as an illustrative example of a referral source when it issues conditional renewals. See, e.g., Eagle Radio, Inc., 9 FCC Rcd 836, 858 n. 18 (1990).)

Lauher was fired in July, 1989. His departure supposedly did not relate to EEO. KFUD Ex. 6, p. 3 ¶7.

125. Lauher stated that he recalls "contacting the St. Louis Broadcast Center and taking out ads in various publications including Broadcasting and the St. Louis Post-Dispatch." Id. He did not state how often these contacts were made, whether any other sources were used, or whether these contacts were made in order to attract more minority applicants. Id.

126. As discussed infra at ¶¶181-202, Lauher wrote two March, 1989 memoranda to Devantier, with copies to Stortz, other KFUD managers and counsel, which focused on license renewals and expressly raised the possibility of loss of license. Based on Lauher's analysis, KFUD developed certain new EEO tracking forms, and KFUD-FM sent letters to ten local universities and personnel agencies in July, 1989 "stating that it encouraged minority applications and seeking help in recruiting minorities." KFUD Ex. 4, p. 14. However, these letters did not notify the universities and personnel agencies of any actual jobs. Instead, the letters said:

Station KFUD-FM is an Equal Opportunity Employer. From time to time, we have job openings at our station which require a variety of skills and talents. We encourage members of minority groups and women to apply for these positions, and we seek your help in referring minorities and women to us.

We will be contacting you as job openings arise at our station. In the meantime, if you know of minority group members and/or women who might be interested in working at our station, please do not hesitate to refer them directly to me. In the event you do not presently know of any such candidates, please refer them to me whenever they come to your attention....

MMB Ex. 2, p. 8.

127. The letter enclosed a response form "to acknowledge that I have received a letter from Station KFUD-FM seeking female and minority referrals for job openings at the station." Id., p. 9.

128. The reason Lauher sent these letters is clear from this colloquy at trial:

- Q. What was the purpose of sending these letters in July of 1989 to the various named recipients?
- A. There was something that Mr. Liebowitz [sic] had said in the seminar portion at that fall meeting of the Missouri Broadcasters Association that led me to feel regardless of what had been done at any prior time that it was best to err on the side of making sure, and that's all I felt that we were doing there was just making sure.
- Q. Making sure of what exactly?
- A. That we were -- that we had in writing to these various agencies the -- what the letter states.

Tr. 189.

129. Thus, these were form letters, built around the assumption that busy people in employment agencies will happily make the time to refer unemployed persons to interview for jobs which do not exist. Not surprisingly, they did not yield any minority referrals. MMB Ex. 6, p. 5.

130. As noted above, the letters manifested that "[w]e will be contacting you as job openings arise at our station." MMB Ex.2, p. 8. After these one-shot letters were sent, KFUD filled nine positions during the remainder of license term. KFUD Ex. 4, Tab 6, pp. 6-8 and 14-15. KFUD did not contact the form letter's ten university and personnel agencies for even one of these openings. KFUD Ex. 4, Tab 6, pp. 6-8 and 14-15. Two of the positions, an AM secretary and an FM announcer, were filled within five weeks of Lauher's letters. Id., pp. 6, 14.

131. Stortz said because of "turnover in managerial personnel in the summer of 1989" Lauher's EEO forms were not used "during the remainder of that year." KFUD Ex. 4, p. 15.

132. Stortz maintained that KFUD-FM "made a concerted effort to hire a minority salesperson and did in fact hire Caridad Perez, a Hispanic female, in March 1988." KFUD Ex. 4, p. 12. On the witness stand, Stortz said this "concerted effort" involved advertising in the St. Louis Post-Dispatch and contacting the St. Louis Broadcast Center for the position for which Perez was hired. Tr. 515. He was wrong: there was no "concerted effort." For the position filled by Perez, no recruitment source was contacted. Perez' resume was on file. KFUD Ex. 4, Tab 6, p. 5. Nor were any other sales positions for which KFUD went out of its way to seek out minority applicants. KFUD Ex. 4, Tab 6, pp. 1-8. Indeed, KFUD did not provide a single piece of evidence to document that the "concerted effort" Stortz boasted of in his direct testimony consisted of anything more than KFUD's present time wish that it could rewrite history.

133. Like Stortz, Lauher boasted of Perez' hire, saying that "[w]e wanted to hire a variety of people and wanted to hire a minority. Therefore, we were very pleased when Caridad Perez applied for a sales position.<sup>19/</sup> Lauher did not identify the "we" who supposedly "wanted to hire a minority," nor did he identify any steps taken to increase the likelihood that the Stations would ever hire a minority salesperson. At least he did not suggest that Ms. Perez came to KFUD as a result of any recruitment efforts. Id.

**b. Procedures After The  
Petition To Deny Was Filed**

134. After the Petition to Deny was filed, KFUD filled four vacancies. KFUD Ex. 4, Tab 6, pp. 7-8 and 15. KFUD used a variety of sources to fill two of these vacancies, including several newspapers and the Lutheran Employment Project (discussed below). These were a secretary/receptionist and service worker position, and they were filled in the last two days of the license term. Together these positions generated ten applicants, eight of whom were minorities. Id., p. 8.

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<sup>19/</sup> Although Lauher's written testimony went through several drafts and was written with the assistance of two attorneys, he nonetheless claimed that the words "a minority" was an inadvertent mistake and that he really meant to say "minorities." Tr. 103-06. Obviously, there is a big difference between tokenism and equal opportunity. As shown herein at p. 55, n. 18, Lauher is not trustworthy.

135. According to Stortz, KFUD advertised in two African American newspapers, the St. Louis American and the St. Louis Sentinel "for the then-existing job vacancies." KFUD Ex. 4, p. 15. However, these newspapers were used only for the one secretarial and one service worker opening discussed above. KFUD Ex. 4, Tab 6, p. 8. The advertisements were placed in the January 25, 1990 issues of these publications, three weeks after the Petition to Deny was filed. See KFUD Ex. 4, Tab 9, pp. 9-12.

136. Stortz testified that these ads were placed because:

We began to recruit more vigorously. And the second thing that happened was we did receive the petition to deny the license. And we felt that we should specifically target, begin specifically targeting for recruitment.

Tr. 544.

137. However, KFUD had not begun "to recruit more vigorously." The number of outside referrals reflected in KFUD Ex. 4, Tab 6 in each year of the license term is given in Table 5.

**TABLE 5**

**JOB REFERRALS MADE BY KFUD**

Data for 1983 includes only the period February 1, 1983 through December 31, 1993. Data for 1990 includes only the period January 1, 1990 through January 31, 1990.

<u>Year</u>	<u>Number of Hires</u>			<u>Number of Hires for which Secular Sources Were Contacted</u>		
	<u>Full-Time</u>	<u>Part-Time</u>	<u>Total</u>	<u>Full-Time</u>	<u>Part-Time</u>	<u>Total</u>
1983	1	1	2	0	0	0
1984	3	4	7	0	0	0
1985	5	9	14	1	0	1
1986	3	3	6	0	0	0
1987	10	6	16	4	1	5
1988	7	10	17	0	0	0
1989	11	7	18	2	1	3
1990	3	1	4	2	0	2
TOTAL	43	41	84	9	2	11

138. Thus, KFUD had a heavy turnover of employees since 1985, but it hardly recruited vigorously at all. In no year did the number of positions subject to even ministerial recruitment (e.g. ads in Broadcasting) exceed five. Since KFUD had not begun to recruit more vigorously before its 11th hour placements, only the second of Stortz' two reasons for the 11th hour placements is valid: the Petition to Deny had been filed. See ¶136 supra.

139. In a response to a Bilingual letter, Stortz represented that the St. Louis Sun and the St. Louis Argus were also used for the secretarial and service worker vacancies filled in January, 1990.<sup>20/</sup> MMB Ex. 6, pp. 4-5. Mysteriously, Stortz' direct case testimony omitted any reference to the Sun and the Argus, and KFUD's exhibit showing ads it placed in newspapers contains no such ads. KFUD Ex. 4, p. 15; KFUD Ex. 4, Tab 9.

140. Even in 1991, after the license term ended, when KFUD was under intense scrutiny through the Bilingual investigation, KFUD did not contact minority sources, although it filled at least two positions that year -- an AM announcer and a secretary. MMB Ex. 6, p. 5; see also ¶149 infra (KFUD used the Lutheran Employment Project in 1991 for a secretarial but not an announcer vacancy.) Continuing into June, 1994, other than the secretary/receptionist and janitor positions filled in January, 1990, KFUD never placed an advertisement in the St. Louis Sentinel, according to its Editor and Associate Publisher, Michael C. Williams. NAACP Ex. 10.

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<sup>20/</sup> The Sun, now defunct, was not a Black newspaper. Tr. 545 (Testimony of Dennis Stortz).

**c.     **Abstention From Use Of  
Lutheran Minority Resources  
Or Minority Classical Resources****

141. The Stations did not even make use of the Synod's own well established minority outreach programs to seek minority applicants, or minority classical resources, as shown below.

142. Clancy, the Director of the Synod's Commission on Black Ministry, since July 1, 1990 and a senior Synod official since 1970, stated that "one of my personal goals was to recruit African Americans to attend the Church's colleges, universities and seminaries and to recruit African Americans for full-time Church work." KFUO Ex. 2, p. 1, ¶1.

143. Clancy reported that the Synod has 50,000 African American members out of a total membership of 2.6 million [1.92%]; that approximately 86 African American Lutherans serve as pastors of congregations, and 30 serve as college or seminary faculty and administrative staff members.<sup>21/</sup> KFUO Ex. 2, p. 1, ¶2.

144. Clancy also reported that 17.9% of the students at the twelve campuses of Synod colleges, universities and seminaries are minorities and more than half of these are African American. The Synod operates ten colleges and two seminaries; Concordia Seminary in St. Louis is one of the seminaries. KFUO Ex. 2, p. 2 ¶4.

145. Clancy is no stranger to the Stations, having been a guest on its programs. KFUO Ex. 2, p. 3, ¶7.

146. Yet Clancy, a KFUO witness, testified that he was not involved in helping KFUO find qualified employees and had no knowledge of how one comes to be employed at KFUO. Tr. 718-20.

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<sup>21/</sup> The Synod claims to have more African American members than any other Lutheran church body. See KFUO's December 28, 1992 Response, MMB Ex. 14, p. 26.



147. Clancy's office was not the only minority employment resource operated by the Synod. Another source available to the Synod was the Lutheran Employment Project of St. Louis, a clearinghouse for employment of members of minority groups. KFUE Ex. 4, p. 15.<sup>22/</sup>

148. Stortz maintained that "as the result of several letters from communications counsel during 1989," KFUE began seeking referrals in 1989 from the Lutheran Employment Project. Id. KFUE did not explain why the Stations had not used the Lutheran Employment Project earlier, or why it took "several letters from communications counsel" in a license renewal year to motivate him to use this Lutheran minority employment resource.

149. Even after these "several letters," KFUE used the Lutheran Employment Project during the license term only for a secretarial and a janitorial opening. KFUE Ex. 4, Tab 6. The record reflects that even in 1991, when KFUE was under intense scrutiny through the Bilingual investigation, KFUE informed the Lutheran Employment Project of a secretarial vacancy but not an AM announcer vacancy. MMB Ex. 6, p. 5.

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<sup>22/</sup> Stortz' written testimony maintained that the Synod also operates the Lutheran Employment Project. KFUE Ex. 4, p. 15. However, his oral testimony indicated that it is "Pan-Lutheran" and includes Lutherans who are not part of the Synod. Tr. 754. Stortz did not know whether the Synod supports the Lutheran Employment Project.

150. KFUE's February 23, 1990 Opposition claimed that KFUE contacted Otis Woodard, Director of Lutheran North St. Louis Outreach, with notices of job vacancies. KFUE Ex. 4, Tab 7, p. 20. Otis Woodard, a lifelong Lutheran who is a lay minister, stated in a declaration that "KFUE has never approached me as a referral source for minority applicants." NAACP Ex. 11. Otis Woodard's former wife, Kathryn Woodard, was Vice President of Lutheran North St. Louis Outreach from 1985 to 1992. NAACP Ex. 15. In a surrebuttal exhibit, Stortz maintained that he contacted her about the receptionist and janitor positions open on January 17, 1990. KFUE Ex. 11. However, KFUE's list of job vacancies prepared for its direct case listed no such contacts. KFUE Ex. 4, Tab 6. Kathryn Woodard stated that she believes she may have received a request from KFUE for referrals of applicants for positions as a receptionist and as a janitor in January, 1990, but "[a]part from that contact, I can recall no previous or subsequent request from KFUE-AM-FM for referrals of candidates for employment." NAACP Ex. 15. KFUE has no documents showing that Kathy Woodard was contacted for any position, apart from perhaps the January, 1990 positions. Tr. 1095 (Testimony of Dennis Stortz).

151. KFUE offered no evidence that it ever considered contacting minority classical music resources to seek employees.

### **3. Application Form Lacking EEO Language**

152. An employment application form in use in November, 1984 contains a statement that KFUE does not discriminate, and notifies applicants that they may complain to the FCC if they believe that they have been denied equal employment opportunity. NAACP Ex. 31, p. 4.

153. KFUD subsequently adopted a new form. The one in use at least from January through March, 1988 for both AM and FM positions contains the statement:

Because we are a Church body, the Lutheran Church/Missouri Synod retains the right to give preference in the hiring of persons who are members in good standing of an LCMS congregation.

NAACP Ex. 32, pp. 2, 14, 20; see also MMB Ex. 25. That form contains the words "An Equal Opportunity Employer" but omits any statement that KFUD does not discriminate and that applicants may complain to the FCC if they believe they have been denied equal opportunity. Id. The form also asks applicants to state their "Religious Affiliation." Id. These deficiencies in the form concerned Lauher, who was FM General Manager at the time. Tr. 155-57.

**4. Data On Employees' Religion  
In KFUD Internal Files**

154. When KFUD hired a person, it prepared a "New Employee Data Summary" on him or her. That form included a question classifying employees by religious background, with only three choices provided: pastor, teacher, and layworker. The form also asks "was immediate previous employment with a LCMS college, district, seminary, KFUD, CHI or CPH?" NAACP Ex. 32 (containing several examples). This form was used both for AM and for FM. The record includes examples dating from September 29, 1986 (NAACP Ex. 32, p. 13) to September 18, 1989 (NAACP Ex. 32, p. 8).

5. Disparate Treatment In Interviewing

155. In filling its secretary/receptionist position in January, 1990 (see KFUE Ex. 4, Tab 6, p. 8), KFUE developed a scoresheet for each applicant, ranking them on scales of one to ten for such factors as "punctual," "good appearance," "good guest greeter," and "works well with people." NAACP Ex. 63, p. 1. The applicants for the janitor position filled the same month were similarly scored on scoresheets rating them for such factors as "clean," "legible writing" [sic] and "follows orders." Id., p. 23. Three of the four secretary/receptionist applicants were African American and five of the six janitor applicants were African American. KFUE Ex. 4, Tab 6, pp. 7-8. Stortz testified that the factors considered in evaluating these candidates had been used before; however, he had not seen other instances in which candidates had been scored numerically or with a written instrument. Tr. 520-522, 727-30, 790.

G. Complaints Of Discrimination

156. Devantier maintained that no employee or job applicant "complained that the Stations discriminated against him or her on the grounds of race or religion." KFUE Ex. 7, p. 9 ¶18.23/

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23/ He was not referring to sex discrimination, and thus was not counting Jan Hutchinson's statement that she was passed over for a sales management position in favor of a less qualified man, Bernhard Hentze. NAACP Ex. 7, p. 1. She had extensive radio sales experience (including, of course, classical experience) and he did not. Id.

157. However, Devantier did not state that such employees or applicants would have known the reasons they were considered or not considered for employment, hired, placed, promoted or fired, or whether discrimination was among those reasons. Devantier testified that he could recall no letter to a nonselectee for a job which notified that person of the reason he or she was not chosen. Tr. 813. Thus, no one was in a position where they could have been subjected to individualized discrimination, e.g., by applying for a job and being rejected. It follows that KFUEO has not met its burden of proof that any significance should be attached to the absence of discrimination complaints.

